

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

EOG RESOURCES, INC.,

Plaintiff,

v.

P. DIANE JOHNSON,

In Her Capacity as the Chief Judge of the Three
Affiliated Tribes District Court of the Fort Berthold
Indian Reservation, and

YVETTE FALCON,

In Her Capacity as the Court Clerk/Consultant of
the Three Affiliated Tribes District Court of the
Fort Berthold Indian Reservation,

Defendants.

Case No. _____

COMPLAINT

Plaintiff EOG Resources, Inc. (“EOG”), by and through its undersigned counsel, respectfully submits this Complaint seeking a declaratory judgment and injunctive relief against Defendants P. Diane Johnson and Yvette Falcon (“Defendants”), and states as follows:

NATURE OF THE CASE

1. Because Defendants are improperly permitting a putative class action lawsuit against EOG to proceed in the Three Affiliated Tribes (“Tribes”) District Court of the Fort Berthold Reservation, New Town, North Dakota (the “Tribal Court”), EOG brings this action seeking a declaratory judgment that the Tribal Court lacks subject matter jurisdiction over claims arising out of EOG’s oil and gas operations on allotted Indian lands of the Fort Berthold Reservation (the “Reservation”). Similarly, EOG seeks an injunction prohibiting Defendants

from adjudicating the putative class action and subjecting EOG to litigation in a forum that has no jurisdiction.

THE PARTIES

2. Plaintiff is a Delaware corporation with its principal place of business in Houston, Texas. Plaintiff is a non-Indian and not a member of the Tribes.

3. Defendant P. Diane Johnson is an individual, a North Dakota resident, and the Chief Judge of the Tribal Court. She is named in this suit in her official capacity only.

4. Defendant Yvette Falcon is an individual, a North Dakota resident, and a Clerk/Consultant of the Tribal Court. She is named in this suit in her official capacity only.

JURISDICTION AND VENUE

5. This is an action for a declaratory judgment under 28 U.S.C. § 2201 and injunctive relief pursuant to Fed.R.Civ.P. 65.

6. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 as it concerns matters arising from the Constitution, laws, or treaties of the United States. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716 (2008) (determining that a tribal court's "adjudicative authority over nonmembers [of a federally recognized Indian tribe] is a federal question"); *see also Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 2014 WL 458054, *2 (D.N.D. 2014) ("A tribal court's exercise of jurisdiction over non-Indians is a federal question answered by federal law."), *citing Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

7. Defendants' unlawful exercise of Tribal Court jurisdiction is an actionable violation of federal common law, *Ex Parte Young*, 209 U.S. 123 (1908), because "there is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial

power.’” *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011), *quoting MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002). Because their actions exceed the Tribes’ legal authority, this suit against Defendants in their official capacities is appropriate. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (U.S. 2014) (*Ex parte Young* doctrine extends to officials of Indian tribes).

8. Nor are Defendants protected in this instance by the doctrine of tribal sovereign immunity. *Crowe*, 640 F.3d at 1155-56 (“Today we join our sister circuits in expressly recognizing *Ex Parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity”), *citing Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miscoosukee Tribe of Indians*, 177 F.3d 121, 1225-26 (11th Cir. 1999).

9. This Court further has subject matter jurisdiction because EOG is not required to exhaust all available Tribal Court remedies because it is plain that the Tribal Court lacks jurisdiction, and requiring EOG to exhaust further tribal court remedies would serve no purpose other than delay. *See Strate v. A-I Contractors*, 520 U.S. 438, 459 n. 14 (1997), *citing Nat'l Farmers Union*, 471 U.S. at 854.

10. Venue is appropriate pursuant to 28 U.S.C. § 1391(b) as Defendants reside in North Dakota and the acts complained of occurred in this District.

11. The Court has personal jurisdiction over Defendants, each of whom is a North Dakota resident.

GENERAL ALLEGATIONS

THE TRIBAL COURT COMPLAINT

12. On or about February 10, 2014, four individuals – Jolene Burr, Ted Lone Fight, Georgianna Danks and Edward S. Danks (the “Tribal Court Plaintiffs”) – initiated a putative class action lawsuit against EOG and several other non-Indian defendants in the Tribal Court. The lawsuit is captioned *Burr, et al. v. XTO Energy Inc., et al.*, Case No. CV-2014-0048.

13. The Tribal Court Plaintiffs purport to be either “enrolled” or “non-enrolled members” of the Tribes, each of whom claims to possess unspecified mineral interests within the Reservation.

14. The Tribal Court Plaintiffs’ Amended Complaint (the “Tribal Court Complaint”), a true and correct copy of which is attached hereto as Exhibit 1, alleges that EOG’s operations within the Reservation run afoul of “either Tribal or State law” regarding the flaring of natural gas. [Ex. 1, Tribal Court Complaint at ¶ 23].

15. The Tribal Court Complaint suggests that EOG has failed to pay the Tribal Court Plaintiffs royalties “for past, present and future flared gas.” [*Id.* at ¶¶ 23-24].

16. The Tribal Court Plaintiffs insist that they have “standing to sue on behalf of the Tribe[s] and seek compensation on behalf of the Tribe[s].” [*Id.* at ¶ 17].

EOG’S OPERATIONS ON THE RESERVATION

17. EOG has several allotted land mineral leases within the Reservation (the “Leases”), all of which were granted pursuant to the Act of March 3, 1909, 25 U.S.C. § 396, and duly approved by the Secretary (the “Secretary”) of the United States Department of the Interior (the “Department”).

18. Upon information and belief, EOG maintains a consensual relationship with only one of the four named Tribal Court Plaintiffs – Ms. Jolene Burr – who owns a very small allotted mineral interest in an allotment that is encumbered by one of the Leases.

19. The Tribes have been issued a corporate charter under Section 17 of the Indian Reorganization Act of 1938, 25 U.S.C. § 477 (the “Tribes’ Section 17 Corporation”).

20. The Tribal Court Plaintiffs allege that they are authorized to assert claims on behalf of the Tribes’ Section 17 Corporation, [Ex. 1 at ¶¶ 1, 17]; however, because EOG maintains no relationship with the Tribes’ Section 17 Corporation and because the Tribal Court Plaintiffs are not authorized to bring suit on behalf of the Tribes, the Tribal Court is without jurisdiction to adjudicate the Tribal Court Plaintiffs’ claims with respect to the Tribes’ Section 17 Corporation.

21. To the best of its knowledge, EOG also has no consensual relationship with the three other Tribal Court Plaintiffs and no such relationship is asserted in the Tribal Court Complaint.

22. Without a consensual relationship, there is no jurisdictional basis for the Tribal Court Plaintiffs’ suit against EOG in Tribal Court or their attempt to assert claims on behalf of the Tribes.

GOVERNING FEDERAL LAW

23. The Tribal Court is without jurisdiction to adjudicate a claim initiated by a non-Indian plaintiff – including “non-enrolled members” of the Tribes – against a non-Indian defendant.

24. Even with respect to “enrolled” members, it is the Secretary – not the Tribes or the State of North Dakota – that has exclusive authority to regulate oil and gas operations,

including the flaring of gas, on allotted Indian lands. *See Rainbow Resources v. Calf Looking*, 521 F.Supp. 682, 684 (D. Mont. 1981) (“Congress has chosen to grant exclusive authority for the regulation, administration and supervision of oil and gas leases on lands allotted to individual Indians to the Secretary”).

25. Accordingly, EOG’s Leases are all form leases as prescribed by the Secretary – and each expressly provides that EOG’s operations are subject exclusively to federal law and the regulations of the Secretary.

26. In turn, the Secretary has enacted regulations to further manage and completely control oil and gas operations, including the payment of royalties. *See* 25 C.F.R. Part 212 (Leasing of Allotted Lands for Mineral Development); *see also* 30 U.S.C. § 1701 (Federal Oil and Gas Royalty Management Act, governing collection and disbursement of oil and gas revenues on allotted lands); 43 C.F.R. Part 3160 (regulations of the Bureau of Land Management (“BLM”) governing oil and gas operations on Indian lands); BLM Notice-to-Lessees 4A (setting forth procedures and permissions for the flaring of natural gas in connection with oil and gas leases on allotted lands).

**DEFENDANTS’ FAILURE TO ACT REGARDING THE TRIBAL COURT’S LACK OF SUBJECT
MATTER JURISDICTION**

27. On the face of the Tribal Court Complaint, it is clear that the Tribal Court Plaintiffs lack standing and, regardless, the purported claims are within the exclusive purview of the federal government.

28. Thus, it is plain that the Tribal Court lacks jurisdiction and EOG need not exhaust its remedies in Tribal Court.

29. The lack of jurisdiction notwithstanding, on May 24, 2014, Defendant Falcon, acting in her capacity as Clerk/Consultant of the Tribal Court, issued an Amended Summons for the Tribal Court Complaint.

30. The Amended Summons and Complaint were subsequently served upon EOG's registered agent.

31. Defendant Johnson, acting in her capacity as Chief Judge of the Tribal Court, has permitted the Tribal Court Complaint to proceed even though the Tribal Court lacks subject matter jurisdiction.

32. Defendant Falcon, acting in her capacity as Clerk/Consultant of the Tribal Court, has permitted filing of the Tribal Court Complaint and the scheduling of pleadings and other matters pertaining to adjudication of the Tribal Court Complaint.

33. By taking the actions described in paragraphs 31 and 32 hereof, Defendants have acted outside the scope of their authority and permitted the Tribal Court Plaintiffs to prosecute their claims in the Tribal Court in violation of federal law.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

34. EOG hereby realleges and incorporates by this reference all allegations contained in Paragraphs 1 through 33 of this Complaint as though fully set forth herein.

35. The Federal Declaratory Judgment Act, 28 USC. § 2201, *et seq.* empowers the Court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

36. An actual and justiciable controversy exists regarding the Tribal Court's jurisdiction to adjudicate a putative class action lawsuit regarding EOG's oil and gas operations and related royalty payments, which purports to be maintained by both enrolled and non-enrolled

members of the Tribes, and which further purports to assert claims and seek compensation on behalf of the Tribes' Section 17 Corporation.

37. Because federal law clearly and unambiguously provides the Federal Government with exclusive regulatory control of oil and gas operations on allotted Indian lands, EOG is entitled to a declaratory judgment that the Tribal Court lacks subject matter jurisdiction to adjudicate the Tribal Court Complaint.

SECOND CLAIM FOR RELIEF
(Permanent Injunction)

38. EOG hereby realleges and incorporates by this reference all allegations contained in Paragraphs 1 through 37 of this Complaint as though fully set forth herein.

39. In light of pervasive scheme of federal law and regulations governing oil and gas operations on allotted Indian lands, EOG is likely to succeed on the merits and establish that the Tribal Court lacks subject matter jurisdiction with respect to the Tribal Court Complaint.

40. Defendants' conduct has caused and, unless restrained and enjoined by this Court, will continue to cause irreparable harm, damage and injury to EOG, including but not limited to: (i) forcing EOG to participate in legal proceedings in a forum that lacks jurisdiction in violation of EOG's constitutional rights; (ii) exposing EOG to the possibility of multiple and duplicative lawsuits regarding flaring royalties, with the further possibility of inconsistent results; (iii) causing damage to EOG's business reputation and good will on the Reservation and with other lessees; and (iv) causing damage to EOG's property rights insofar as there may be no alternative to flaring natural gas other than to "shut in" production from a well.

41. A permanent injunction will not result in any injury to Defendants, who have no stake or interest in the outcome of the Tribal Court Complaint; and, thus, the balance of harms weighs in favor of injunctive relief.

42. EOG has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing, Plaintiff EOG Resources, Inc. respectfully requests that the Court enter judgment in its favor and against Defendants on each Claim for Relief set forth herein, and issue the following relief:

- (a) For declaratory relief, decreeing that the Tribal Court lacks subject matter jurisdiction over claims arising out of EOG's oil and gas operations, including flaring and related royalty payments, on allotted Indian lands;
- (b) For permanent injunctive relief, precluding Defendants or anyone acting in concert with or on behalf of Defendants from adjudicating the claims set forth in the Tribal Court Complaint; and
- (c) For any further, necessary, or proper relief that the Court deems appropriate.

Dated this 29th day of July, 2014.

Respectfully submitted,

/s/ Lawrence Bender

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